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101ST CONGRESS
1st Session

SENATE

REPORT
101-104

DISTRICT OF COLUMBIA CIVIL CONTEMPT
INCARCERATION AMENDMENTS ACT

REPORT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 1163

TO AMEND THE DISTRICT OF COLUMBIA CODE TO LIMIT THE
LENGTH OF TIME FOR WHICH AN INDIVIDUAL MAY BE INCAR-
CERATED FOR CIVIL CONTEMPT IN A CHILD CUSTODY CASE IN
THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA AND TO
PROVIDE FOR EXPEDITED APPEAL PROCEDURES TO THE DIS-
TRICT OF COLUMBIA COURT OF APPEALS FOR INDIVIDUALS
FOUND IN CIVIL CONTEMPT IN SUCH A CASE

together with

ADDITIONAL VIEWS



AUGUST 3 (legislative day, JANUARY 3), 1989.—Ordered to be printed

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DISTRICT OF COLUMBIA CIVIL CONTEMPT
INCARCERATION AMENDMENTS ACT

AUGUST 3 (legislative day, JANUARY 3), 1989.—Ordered to be printed

Mr. GLENN, from the Committee on Governmental Affairs,
submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 1163]

The Committee on Governmental Affairs, to which was referred the bill (S. 1163) to amend the District of Columbia Code to limit the length of time for which an individual may be incarcerated for civil contempt in a child custody case in the Superior Court of the District of Columbia and to provide for expedited appeal procedures to the District of Columbia Court of Appeals for individuals found in civil contempt in such a case having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

I. PURPOSE AND SUMMARY

Under present law in the District of Columbia, a court may incarcerate an individual for civil contempt for refusal to obey an order of the court. At the court's discretion, the individual may continue to be incarcerated until such time as he or she complies with the court's order. Thus, the purpose of civil contempt is coercive—to induce recalcitrant persons to obey the court.

S. 1163 placed a twelve (12) month limit on the length of time for which an individual may be incarcerated for civil contempt in a child custody case before the Superior Court of the District of Columbia. The bill further provides for the hearing of an appeal from

an order of the Superior Court holding an individual in civil contempt in a child custody case within sixty (60) days after the individual requests such an appeal. Finally, S. 1163 stipulates that its provisions shall apply to individuals imprisoned under the foregoing circumstances on or after January 1, 1987.

The issues addressed by S. 1163 came to public attention as a result of a case currently pending in the District of Columbia. One of the parties to that case, Dr. Elizabeth Morgan, has been incarcerated for nearly two years for refusing to comply with the court's order that she disclose the whereabouts of her minor daughter so that Dr. Morgan's former husband might exercise visitation rights. There is presently no indication when Dr. Morgan's imprisonment for civil contempt might end despite her evident determination to defy the court indefinitely. The *Morgan* case raises the question of how long imprisonment for civil contempt should continue when full due process has not been afforded the contemnor, and after it is arguable that the coercive purpose of confinement has failed.

II. BACKGROUND AND NEED FOR LEGISLATION

Under the general doctrine of civil contempt, a judge may fine or imprison an individual for refusal to obey a court order. The contempt power enables a judge to compel compliance with the court's decrees and to protect the rights of parties to a case. In these instances, the court uses imprisonment for civil contempt to secure prospective obedience with a court order; by contrast, the court employs criminal contempt to punish past contumacious behavior. *Hicks v. Feiock*, 108 S. Ct. 1423, 1430 (1988).

The contempt power of the Superior Court of the District of Columbia is set forth in title 11, Section 944 of the District of Columbia Code ("The Superior Court, or a judge thereof, may punish for disobedience of an order or for contempt committed in the presence of the court") (1981 & Supp.). Title 11, Section 741 of the District of Columbia Code prescribes in identical terms the contempt authority of the District of Columbia Court of Appeals.

Thus, under present District of Columbia law, there is no cap on the length of incarceration for civil contempt. This feature of the law has come under criticism because such incarceration is imposed by the court without many of the due process protections afforded to criminal defendants. Due process in a civil contempt proceeding requires only that an individual be provided notice and a hearing. Note, "Modern Discussion of a Venerable Power: Civil Versus Criminal Contempt and Its Role in Child Support Enforcement: *Hicks v. Feiock*," 22 Creighton L. Rev. 163, 171 (1988).

In contrast, in criminal contempt cases, the United States Supreme Court has held that the right to a jury trial must be provided at least where incarceration of more than six months is possible. *Bloom v. Illinois*, 391 U.S. 194 (1968). Criminal contemnors are also entitled to notice, hearing, and the opportunity to call and cross-examine witnesses. Martineau, "Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt," 50 U. Cin. L. Rev. 667, 697, n. 126 (1981).

The absence of due process safeguards for civil contemnors has been justified on the grounds that the contemnor may at any time

choose to be released by complying with the court's order. Civil contemnors "carry the keys of their prison in their own pockets." *In re Nevitt*, 117 F. 448, 461, (8th Cir. 1902). Another justification is that, in the context of private litigation, the civil contempt sanction is intended to enforce, between private individuals, rights already adjudicated by a court.

Civil contempt does not ordinarily result in lengthy imprisonment because the basis for the civil contempt order often ceases before a considerable amount of time has passed. For example, the evidence which the contemnor is withholding is obtained in some other way or the proceeding to which it is relevant is completed. In the case of a grand jury, the contempt order becomes moot when the term of the grand jury expires. 28 U.S.C. § 1826 (1970).

In child custody cases, however, the incarceration of a parent for disobeying a court's order to produce the child can only be ended when the parent surrenders the child, or the child is found by other means. That fact distinguishes civil contempt arising out of a child custody case from civil contempt in many other types of cases.

Under current District of Columbia law, an individual jailed for civil contempt may be freed if he or she complies with the court's order or if that order becomes moot. The other possible way the imprisonment may end is if the sentencing trial court determines that the imprisonment can no longer fulfill its coercive purpose. However, except in a few limited circumstances, there is no statutory definition of the point at which such imprisonment ceases to be coercive and becomes wholly punitive. Note, "Modern Discussions of a Venerable Power: Civil Versus Criminal Contempt and Its Role in Child Support Enforcement: *Hicks v. Feiock*", 22 Creighton L. Rev. 163, 173 (1988). S. 1163 identifies that point by incorporating the presumption that, after 12 months, imprisonment for civil contempt in a child custody case can no longer be deemed coercive.

III. HISTORY OF S. 1163

On June 13, 1989, Senator Orrin Hatch introduced S. 1163, a bill to limit to twelve months the length of time an individual could be incarcerated for civil contempt in District of Columbia child custody cases. On June 29, 1989, S. 1163 was referred to the Governmental Affairs Committee and on the same day, to its Subcommittee on General Service, Federalism and the District of Columbia. H.R. 2136, a bill to limit generally civil contempt imprisonment in the District of Columbia, passed the House of Representatives on June 28, 1989, was referred to the Senate Committee on Governmental Affairs on July 11, 1989, and was referred to the Subcommittee on General Services, Federalism, and the District of Columbia on July 19, 1989.

The House and Senate bills, though similar in purpose, are different in several respects. The most significant is that while H.R. 2136 limits imprisonment in all civil contempt cases in the District of Columbia, S. 1163 would do so only in child custody cases.

The Senate Subcommittee on General Services, Federalism and the District of Columbia held a hearing on Friday, July 21, 1989 on

S. 1163 and H.R. 2136. The witnesses testifying at this hearing were Senator Orrin Hatch, the sponsor of S. 1163; Judge Peter J. Messitte, Associate Judge for the Circuit Court of Montgomery County, Maryland; and Professor Doug Rendleman of the Washington and Lee University Law School.

Senator Hatch stated, in support of S. 1163, his preference for limiting the bill to child custody cases because the need for limits on incarceration for civil contempt has been most compellingly demonstrated in that area—specifically by the *Morgan* case. Senator Hatch maintained that, since problems with imprisonment for civil contempt have not arisen in the District of Columbia beyond the context of child custody cases, a judge's summary contempt authority should not be generally limited. Senator Hatch gave the opinion that after twelve months, continued imprisonment is unlikely to coerce a contemnor in a child custody case to comply with a court order.

Judge Messitte expressed concern about limitations on judicial authority. He conceded the theoretical propriety of a limitation on imprisonment for civil contempt once its coercive effect has been dissipated, although he stressed that judicial prerogative should not be unduly limited. Judge Messitte testified that limits on incarceration for civil contempt would not infringe upon judicial authority so long as the "cap" was not of too short a duration. He testified that in his experience the threat, let alone the imposition, of incarceration suffices to bring about compliance in "99.9% of cases."

Professor Rendleman expressed concern that the civil contempt power, as it currently exists in the District, may admit of abuse. His statement for the record noted that the "results of the lack of a statutory cap are potential arbitrariness, capriciousness, harshness, as well as futile imprisonments. * * * Citizens are confined unnecessarily. Respect for the courts and government declines." Professor Rendleman pointed out that Congress chose an eighteen (18) month cap on imprisonment for civil contempt in the Federal recalcitrant witness statute.

Witnesses at the Subcommittee hearing also testified that the language of S. 1163 might place a cap on imprisonment for all contempt, criminal as well as civil. This was not the intent of the sponsor of S. 1163, Senator Hatch. The witnesses agreed that following completion of any maximum commitment for civil contempt, an individual might continue to be incarcerated, but only as a punitive sanction upon due conviction of criminal contempt or some other underlying criminal offense.

Another question raised at the hearing was whether a judge could avoid the intent of the bill by releasing an individual confined for civil contempt at the end of twelve months, only to recommit the person for what in effect would be continuing defiance of the court's original order. Senator Hatch made clear that such repeated imprisonment for civil contempt was not contemplated by his bill.

The Subcommittee received written comments for the hearing record from the District of Columbia Bar, Section on Courts, Lawyers, and the Administration of Justice, and from the American Civil Liberties Union of the National Capital Area. These groups expressed reservations about the adoption of an absolute limit on

imprisonment for civil contempt, as proposed by S. 1163 and H.R. 2136, and suggested instead the adoption of procedures for expedited appeals and non-deferential review of trial judges' imposition of civil contempt imprisonment. The Subcommittee also received written comments from a number of interested individuals, some of whom likewise opposed the adoption of a mandatory limit on imprisonment for civil contempt in District of Columbia child custody cases.

Following the conclusion of its hearing on July 21, 1989, the Subcommittee on General Services, Federalism, and the District of Columbia polled out S. 1163 by a unanimous vote of 5-0 for action by the full Committee on Governmental Affairs.

IV. COMMITTEE VOTE

The Committee on Governmental Affairs held a markup on S. 1163 on July 26, 1989. The Committee agreed to report the bill favorably, subject to amendment, by a vote of 9-0:

YEAS—9

NAYS—0

Levin
 Sasser
 Pryor
 Bingaman
 Lieberman
 Roth
 Cohen
 Rudman
 Glenn
 Nunn (proxy)¹
 Kohl (proxy)¹
 Stevens (proxy)¹
 Heinz (proxy)¹
 Wilson (proxy)¹

¹ Committee rules proxy votes are counted for recording purposes only on final passage.

At the markup, a technical amendment clarifying certain portions of the bill was offered by Senator Sasser. The amendment, which had the approval of the bill's sponsor, Senator Hatch, was meant to clarify that the limitation being placed upon imprisonment for contempt extends only to civil contempt and not to incarceration for criminal contempt or for any other criminal violation.

Accordingly, the amendment altered subsections (a) and (b) of Section 1 of the bill to specify that the proscription against imprisonment for twelve months, pursuant to the contempt powers of the Superior Court and Court of Appeals, is limited to imprisonment "for civil contempt." Additional language was appended to subsections (a) and (b) to clarify that "[t]his limitation does not apply to imprisonment for criminal contempt or for any other criminal violation."

The amendment was approved by a voice vote of those members of the Committee present.

The text of S. 1163, as reported, is as follows:

SECTION 1. LIMITATION ON TERMS OF INCARCERATION IMPOSED FOR CONTEMPT IN CHILD CUSTODY CASES.

(a) **SUPERIOR COURT.**—Section 11-944 of the District of Columbia Code is amended—

(1) by striking "In addition" and inserting "(a) Subject to the limitation described in subsection (b), and in addition"; and

(2) by adding at the end the following new subsection:

"(b) In any proceeding for custody of a minor child conducted in the Family Division of the Superior Court under section 11-1101(1), no individual may be imprisoned for civil contempt for more than 12 months, pursuant to the contempt power described in subsection (a), for disobedience of an order or for contempt committed in the presence of the court. This limitation does not apply to imprisonment for criminal contempt or for any other criminal violation."

(b) **DISTRICT OF COLUMBIA COURT OF APPEALS.**—Section 11-741 of the District of Columbia Code is amended—

(1) by striking "In addition" and inserting "(a) Subject to the limitation described in subsection (b), and in addition"; and

(2) by adding at the end the following new subsection:

"(b) In the hearing of an appeal from an order of the Superior Court of the District of Columbia regarding the custody of a minor child, no individual may be imprisoned for civil contempt for more than 12 months, pursuant to the contempt power described in subsection (a), for disobedience of an order or for contempt committed in the presence of the court. This limitation does not apply to imprisonment for criminal contempt or for any other criminal violation."

SEC. 2. EXPEDITED APPEALS PROCESS FOR INDIVIDUALS INCARCERATED FOR CONTEMPT IN CHILD CUSTODY CASES.

Section 11-721 of the District of Columbia Code is amended by adding at the end the following new subsection:

"(f) The District of Columbia Court of Appeals shall hear and appeal from an order of the Superior Court of the District of Columbia holding an individual in contempt and imposing the sanction of imprisonment on such individual in the course of a case for custody of a minor child not later than 60 days after such individual requests that an appeal be taken from that order."

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall apply with respect to individuals imprisoned for disobedience of an order or for contempt committed in the presence of the Superior Court of the District of Columbia or the District of

Columbia Court of Appeals in the course of a case for custody of a minor child on or after January 1, 1987.

V. SECTION-BY-SECTION ANALYSIS

Section 1. Limitation on Term of Incarceration Imposed for Contempt in Child Custody Cases

Subsection (a) amends title 11, Section 944 of the District of Columbia Code which embodies the civil contempt power of the Superior Court of the District of Columbia. Section 944 provides that "[i]n addition to the powers conferred by section 402 of title 18, United States Code, the Superior Court, or a judge thereof, may punish for disobedience of an order or for contempt committed in the presence of the court."

The provision of the United States Code referred to discusses "[c]ontempts constituting crimes," and authorizes prosecution and punishment of criminal contempts before the district courts of the United States or courts of the District of Columbia. Section 402, by its terms, does not relate to contempts "committed in the presence of the court" or "committed in disobedience of" orders of the court; these, and other cases of contempt "not specifically embraced in" Section 402, are left for punishment by the affected courts "in conformity to the prevailing usages at law." Thus, Section 11-944 of the District of Columbia Code covers those forms of contempt not embraced within 18 U.S.C. § 402.

Subsection (a) of Section 1 of S. 1163 redesignates the existing language of Section 944 as subsection "(a)" thereof, and adds a new subsection "(b)" setting forth a limitation to which the contempt power described in subsection "(a)" is subject. New subsection "(b)" provides that "[i]n any proceeding for custody of a minor child conducted in the Family Division of the Superior Court under section 11-1101(1) [of the District of Columbia Code], no individual may be imprisoned for civil contempt for more than 12 months, pursuant to the contempt power described in subsection (a), for disobedience of an order or for contempt committed in the presence of the court. This limitation does not apply to imprisonment for criminal contempt or for any other criminal violation."

The proceedings to which the 12-month limitation applies are those pertaining to "child custody" under Section 11-1101(1) of the District of Columbia Code. By specifying "child custody" proceedings only, the Committee intends that the limitations contained in S. 1163 not apply to contempt arising with respect to the other "proceedings" specified under Section 11-1101(1), i.e., "for alimony, pendente lite and permanent, and for support * * * of minor children."

Nor does the Committee intend that the 12-month limitation apply to "proceedings in which a child * * * is alleged to be delinquent, neglected, or in need of supervision," as described in Section 11-1101(13). Thus S. 1163 would not apply, for example, to a case in which a State seeks to ascertain the whereabouts of a minor child of a single parent, for purposes of insuring the child's health and welfare.

The Committee emphasizes that the 12-month "cap" of S. 1163 constitutes an ultimate limitation on imprisonment for civil con-

tempt, for disobedience of a given order or a given episode of contempt committed in the presence of the court. In other words, the Committee intends that an individual who has been committed for the maximum 12 months may not be reincarcerated for continued failure to obey the court order which originally gave rise to imprisonment.

The Committee does recognize that upon modification of a court's order, an individual's refusal to comply with the modified order might constitute new and discrete grounds for civil contempt. Whether a subsequent order is "new," or is in substance merely a repetition of the original order, is in the Committee's view a question for judicial resolution. It is the Committee's intent merely to clarify that if the substance of the order giving rise to civil contempt has remained unchanged, repeated imprisonments of the same individual for successive 12-month periods are prohibited under S. 1163.

Subsection (b) of Section 1 of the bill amends title 11, Section 741 of the District of Columbia Code which sets forth the civil contempt power of the District of Columbia Court of Appeals. Section 741 provides that "[i]n addition to the powers conferred by section 402 of title 18, United States Code, the District of Columbia Court of Appeals, or a judge thereof, may punish for disobedience of an order or for contempt committed in the presence of the court." The bill, S. 1163, changes this section in the same manner as it does Section 944. The new subsection 741(b) provides that "[i]n the hearing of an appeal from an order of the Superior Court of the District of Columbia regarding the custody of a minor child," no individual may be imprisoned for more than 12 months for civil contempt pursuant to the Court of Appeals' exercise of its independent contempt power.

The Committee points out that since the Court of Appeals does indeed possess statutory contempt power, separate from that of the Superior Court, it is conceivable that the Court of Appeals might have occasion during the pendency of an appeal to issue a holding of contempt for disobedience of one of its own orders or contempt committed in its own presence. Thus the 12-month limitation would apply to imprisonment for such contempt, wholly separate from the limitation on imprisonment for contempt before the Superior Court.

However, in the absence of any new grounds for contempt before the Court of Appeals, it is the Committee's understanding and intent that the 12-month limitation on the Superior Court's exercise of its power to incarcerate for civil contempt would apply during the pendency of an appeal. Thus, if the 12-month period were to expire during the appeal, the individual appealing could no longer continue to be imprisoned for refusal to obey the original order.

Section 2. Expedited Appeals Process for Individuals Incarcerated for Contempt in Child Custody Cases

Section 2 of the bill amends Title 11, Section 721 of the District of Columbia Code which sets forth the jurisdiction of the District of Columbia Court of Appeals over appeals from "Orders and judgments of the Superior Court." It adds a new subsection 721(f) which

requires that, when an individual requests an appeal from an order of the Superior Court holding that individual in contempt and imposing incarceration in the course of a case for custody of a minor child, the Court of Appeals "shall hear" the appeal within sixty (60) days of the individual's request.

Section 3. Effective Date

Section 3 provides that the amendments made by S. 1163 shall apply to individuals imprisoned on or after January 1, 1987 for civil contempt in a case in the District of Columbia for custody of a minor child.

VI. MATTERS REQUIRED TO BE DISCUSSED UNDER SENATE RULES

A. COMMITTEE CONSIDERATION OF S. 1163

The Committee met on July 26, 1989 to consider S. 1163. Upon a motion by the Chairman, the bill was ordered reported by a vote of 14-0, subject to further amendments. Senator Sasser offered a technical amendment to clarify that the limitation on imprisonment, embodied in S. 1163, would apply only to incarceration for civil contempt and would not apply to or affect imprisonment for criminal contempt or for any other criminal violation. Senator Sasser's amendment was adopted on a voice vote of all members of the Committee present.

B. COST OF THE LEGISLATION

The Committee anticipates no additional cost to the Federal Government from the enactment of S. 1163 and therefore, did not request any cost estimate from the Congressional Budget Office.

C. EVALUATION OF REGULATORY AND PAPERWORK IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory and paperwork impact of S. 1163. It has also considered the bill's impact on the privacy of individuals or firms doing business with the Federal Government. The Committee's evaluation under paragraph 11(b) must include the four elements listed below.

1. An estimate of the numbers of individuals and businesses who would be regulated and a determination of the groups and classes of such individuals and businesses. S. 1163 would not result in any additional regulation of individuals and businesses.

2. A determination of the economic impact of such regulation on the individuals, consumers, and businesses affected. Not applicable.

3. A determination of the impact on the personal privacy of the individual affected. Not applicable.

4. A determination of the amount of additional paperwork that will result from the regulations to be promulgated pursuant to the legislation, including estimates of the amount of time and financial cost required of affected parties, as well as reasonable estimates of the recordkeeping requirements that may be associated with the legislation. Not applicable.

ADDITIONAL VIEWS OF SENATOR CARL LEVIN

This bill is the first time in my ten years with the Governmental Affairs Committee that we have been presented with the question of the appropriate length and due process requirements of civil contempt in the District of Columbia. It is not an area of the law with which the Committee has longstanding experience or expertise. I would expect the Judiciary Committee to have a better background knowledge of the subject. S. 1163, however, was referred to Governmental Affairs because of our jurisdiction over matters affecting the District of Columbia. However, this issue may actually affect more than just D.C. since it may be interpreted as Congress' view on the overall issue of civil contempt.

At the same time, given the coercive (as opposed to penal) purpose of civil contempt and the limited due process protections, I am sympathetic to the need to have a limit on the length of a civil contempt confinement. Congress has limited contempt in the case of a reluctant witness, for example, to 18 months, and the purpose of contempt in those situations is comparable to the purpose of contempt in a child custody case—forcing individual action.

For the combination of reasons, I only reluctantly voted to report this bill to the full Senate. I am concerned that we didn't devote enough attention and study to this subject. While we have limited this bill's application to only child custody cases, further examination of the issue may have led us to conclude that the 12 month limit should apply in all civil contempt proceedings.

At the same time, Congress has not acted to restrict the length of civil contempt in the federal court system. We would significantly benefit from the advice and guidance of the Senate Judiciary Committee as to whether a limitation on civil contempt has been considered in that Committee and if so, what the Committee's conclusions on the subject were. If it hasn't been addressed by the Judiciary Committee, I think it would be wise for us to seek that Committee's opinion on the subject and to develop a consistent approach for both the D.C. courts and the federal courts.

For these reasons, I stated at the Committee mark-up that I may offer an amendment to S. 1163, when it is considered by the full Senate, that would sunset the provisions of this bill in three years. I would also have the Senate direct the Governmental Affairs and Judiciary Committees, during that period of time, to review the issue of civil contempt and determine whether a similar time limit on all civil contempt both at the federal and D.C. levels is appropriate. The three year limitation on this bill would serve as an action-enforcing mechanism to make us revisit this issue in a broader context before the statute would expire.

CARL LEVIN.

ADDITIONAL VIEWS OF SENATOR WARREN B. RUDMAN

S. 1163, as reported by the Committee, would place a twelve month limit on the amount of time an individual may be incarcerated for civil contempt in child custody cases before the District of Columbia Superior Court. However, this limit is not an end unto itself, but rather the means to accomplish another goal: the release of Dr. Elizabeth Morgan. In fact, her release is the driving force behind S. 1163, and it is not inaccurate to call it a *de facto* private relief bill with Dr. Morgan as its beneficiary. Unfortunately, this measure in its current form would intrude on the legitimate authority of the judicial branch of government, with possible serious negative consequences. Therefore, it is my intention to amend this legislation on the Senate floor to limit its effect to Dr. Morgan.

The history of Dr. Morgan has been well publicized and is fully described in the Committee report, so I shall not recount it here. I agree that Dr. Morgan has been incarcerated long enough under civil contempt and should either be released or, at the very least, given the opportunity of a jury trial. However, I am greatly troubled with S. 1163's mechanism to achieve her release and with the inadequate scrutiny that mechanism has received in the Senate.

While the bill would only limit civil contempt orders in custody disputes before the D.C. Superior Court, it raises a larger issue: the extent to which Congress should intrude upon the ability of the judicial branch of government to enforce legitimate orders issued by the courts.

We are a nation that operates under the rule of law. The defiance of court orders is and must continue to be a serious matter, regardless of the venue, subject, or outcome of the trial. Any legislative effort which, however accidentally, encourages people to disobey the law threatens the fabric of our society.

In recognition of this concern, and in a partial effort to limit this bill's impact to Dr. Morgan, S. 1163 distinguishes between civil contempt orders in custody disputes and civil contempt orders in all other cases. Since it makes no legal sense to assert that judges presiding in custody cases should have less power to enforce their orders than judges in all other cases, the bill is a disturbing precedent in the area of civil contempt.

The civil contempt tool is designed to coerce compliance with a judicial order, not to punish individuals for disobedience. It differs from criminal contempt in two ways. First, the contemnor holds the key to his or her own release by exercising the option to comply with the court order. Second, release is mandatory when no further purpose is served by the contempt order.

This bill would significantly reduce the coercive effect of such incarceration. Under the current practice, judges have considerable success in obtaining compliance with their orders, many times by simply raising the merest possibility of jailing for contempt. This is

because individuals must weigh their defiance of the order against the possibility of an extended, even unlimited, stay in jail. The establishment of a ceiling presents the contemnor with a choice where none existed before: whether to comply with the order or remain incarcerated for a specified time. Not only does this signal the potential contemnor that the system provides an avenue for defiance of an order, but it is likely that the enactment of such a cap will lead to witness a steady increase in the number of individuals who opt for the limited incarceration, especially when they consider the court order to be particularly distressing.

It is possible there are problems in the civil contempt process, but no case has been made that they lie in the length of potential incarceration. Extended time in jail is often necessary. An ongoing case in Maryland is demonstrative of this point. In that state, a woman has been jailed since April, 1988, on a civil contempt charge for failing to obey a judge's order to produce her child. Unlike Dr. Morgan, this woman is a convicted child abuser and is suspected of having abused or killed the child. The state wants the child produced to ensure that he is alive and well, and possibly to take custody. Leaving aside the Fifth Amendment issues at stake, here we have a case where the welfare of the child is at issue and coercive incarceration beyond twelve months seems clearly justified. If S. 1163's concept were applied to this woman, she would have been released three months ago and the whereabouts and well-being of the child would still remain a mystery. It is irresponsible to point to the Morgan case as indicative of the benefits of this legislation, without pointing to the Maryland case as one of its dangers.

Beyond the substantive problems surrounding this measure, S. 1163 has not been subject to the regular legislative process. This is because, although S. 1163 is a substantive bill, it is being accorded fast-track treatment on the grounds that it has an emergency private relief effect. The bill was the subject of one hearing at which only the bill's sponsor, a family court jurist, and a legal academic were allowed to testify. There were no witnesses from the affected jurisdiction, legal groups such as the American or District of Columbia Bar Association, civil liberties groups, and, most importantly, from the D.C. or federal judiciaries. Moreover, the Committee's markup occurred three workdays after the hearings, before the complete hearing record was available.

This haste has had consequences. There are many practical and policy matters which are unresolved, but which could have been addressed in a more thorough legislative process. For example, does a parent who remains incarcerated for the twelve month period in defiance of a court's order to produce a child still retain custody after the twelve months? Could a judge simply issue a new order requiring the presentation of the child, and confine the parent on a new contempt charge? Are there better reforms to be considered in the civil contempt process, such as *de novo* appellate review and the right to effective counsel? Is this intended to be a precedent for other common uses of civil contempt, such as to enforce orders in civil rights cases, to require witnesses to testify under immunity, and to enforce judicial decisions in non-custody civil cases? Does the legislation unconstitutionally interfere with the judge's criminal

contempt power? In my opinion, these are questions which deserve answers before such legislation is passed.

To highlight the haste with which this bill has been put together, it appears that S. 1163 as reported would not ensure the release of Dr. Morgan. The Committee will attempt to amend the bill in the Senate floor to address this flaw. While I will not object to such an effort, it illustrates the unintended consequences of overly hasty consideration of substantive legislation.

When the subcommittee Chairman announced his intention to leave the hearing record open for ten days, one sponsor of the bill urged him not to let Dr. Morgan remain in jail any longer. I support the goal of her release. Accordingly, I will offer an amendment which will ensure Elizabeth Morgan's release, but would make no permanent change in law. By doing so, the Senate could work its will in this case without leaving messy footprints in the D.C. Code.

The Senate, if it so desires, can then engage in a reasoned debate over the merits of the civil contempt issue, with the proper deliberative quality for which it is so renowned, without the motions surrounding Dr. Morgan's plight steering the debate. There is an old lawyer's saying: "Hard cases make bad law." Let us pass a statute to release Dr. Morgan if that is the will of the body. But it would be a grave mistake to make law on the basis of one extraordinary case.

VII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the statutory provisions of the bill are as follows (existing law provisions to be omitted are enclosed in brackets, new material is printed in italic, and existing law in which no change is proposed is shown in roman):

DISTRICT OF COLUMBIA CODE

TITLE 11—ORGANIZATION AND JURISDICTION OF THE COURTS

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CHAPTER 7—DISTRICT OF COLUMBIA COURT OF APPEALS

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§ 11-721. Orders and judgments of the superior court

* * * * *

(f) The District of Columbia Court of Appeals shall hear an appeal from an order of the Superior Court of the District of Columbia holding an individual in contempt and imposing the sanction of imprisonment on such individual in the course of a case for custody of a minor child not later than 60 days after such individual requests that an appeal be taken from that order.

* * * * *

§ 11-741. Contempt powers

[In addition] *(a) Subject to the limitation described in subsection (b), and in addition to the powers conferred by section 402 of title 18, United States Code, the District of Columbia Court of Appeals, or a judge thereof, may punish for disobedience of an order or for contempt committed in the presence of the court. (July 29, 1970, 84 Stat. 481, Pub. L. 91-358, title I, § 111; 1973 Ed., § 11-741.)*

(b) In the hearing of an appeal from an order of the Superior Court of the District of Columbia regarding the custody of a minor child, no individual may be imprisoned for civil contempt for more than 12 months, pursuant to the contempt power described in subsection (a), for disobedience of an order or for contempt committed in the presence of the court. This limitation does not apply to imprisonment for criminal contempt or for any other criminal violation.

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CHAPTER 9—SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

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§ 11-944. Contempt power

[In addition] (a) *Subject to the limitation described in subsection (b) and in addition to the powers conferred by section 402 of title 18, United States Code, the Superior Court, or a judge thereof, may punish for disobedience of an order or for contempt committed in the presence of the court. (July 29, 1970, 84 Stat. 487, Pub. L. 91-358, title I, § 111; 1973 Ed., § 11-944.)*

(b) *In any proceeding for custody of a minor child conducted in the Family Division of the Superior Court under section 11-1101(1), no individual may be imprisoned for civil contempt for more than 12 months, pursuant to the contempt power described in subsection (a), for disobedience of an order or for contempt committed in the presence of the court. This limitation does not apply to imprisonment for criminal contempt or for any other criminal violation.*

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